IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 97 of 1999

HONOURABLE MR.JUSTICE R.P.DHOLAKIA

HONOURABLE MR.JUSTICE KS JHAVERI

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

HANMANBHAI CHANDUBHAI SOLANKI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

==========

Appearance :
THROUGH JAIL for Appellant -MS SADHANA SAGAR for Appellant
MR HL JANI, APP, for Opponent(s) : 1,

==========

CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE KS JHAVERI

Date : 09/10/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE KS JHAVERI)

1.0 This appeal is directed against the judgement and order of conviction and sentence passed by the learned Additional Sessions Judge, Camp Anand, dated 21st January 1999 in Sessions Case No.294 of 1997, whereby the learned Judge has convicted and sentenced the appellant herein under section 302 of IPC and ordered to undergo life imprisonment and to pay fine of Rs.250/-, in default to undergo simple imprisonment for one month.

2.0 The short facts of the prosecution case are as under:

2.1 Hamanbhai Chandubhai Solanki, the appellant-accused had married Kailashben Mangalbhai. After marriage she was staying along with the appellant. On 9.8.1997 Mangalbhai, father of Kailashben was doing his agricultural work. At that time one

Budhabhai Jenabhai came and informed him that his daughter Kailashben has been burned. Mangalbhai therefore went to the place of his daughter and he was informed that Kailashben was admitted in the hospital. On inquiry he came to know that Kailashben was admitted in Sayaji Hospital Vadodara. After reaching there, he asked Kailashben as to what happened. In reply Kailashben told that the appellant had poured kerosene over her and set her ablaze. She further informed that the appellant-accused nurtured some suspicion that she had some illicit relation with his father and therefore he used to ill-treat her and ultimately set her ablaze.

2.2 He therefore lodged a complaint with Dakor Police Station which was numbered as C.R. No. I-0120/97 for the alleged commission of offence under section 307 IPC. PSI Shri Vinodbhai Dhanjibhai went to the place of incident, prepared panchnama of the place, collected samples of earth containing kerosene, etc. and recorded statements of witnesses. The appellant-accused was arrested on 11.9.1997. During the course of investigation he has also recorded statements of various witnesses and as the physical condition of the victim had deteriorated, Inquiring Officer has made

arrangement to call for Executive Magistrate for recording her dying declaration. Thereafter the Executive Magistrate went to the hospital and he inquired from the doctor and also personally verified her physical and mental condition and he found that she was physically and mentally fit for giving dying declaration and therefore he has recorded the same verbatim in question-answer form.

2.3 On 18.8.1997 the victim succumbed to the injuries at SSG Hospital Vadodara and therefore the Inquiring Officer has filled up Marnotar form and also prepared inquest panchnama in the presence of Panch witness. He has also made arrangements to send the dead body for postmortem along with Marnotar form and inquest panchnama and the same has been done by the doctor and report has been kept in the investigation file by the I.O. He has also sent muddamal to FSL for analysis and on receiving the report the same has been kept in the file along with other documents. Section 302 of IPC was therefore added in the complaint.

2.4 On completion of investigation chargesheet was filed in the

court of learned judicial Magistrate First Class, Dakore. Since the offence was exclusively triable by the Sessions Court, the learned Magistrate has committed the case to Court of Sessions, Nadiad. The case was numbered as Sessions Case No.294 of 1997. The learned Additional Sessions Judge framed charge against the accused and the same was read over and explained to the appellant-accused. The appellant-accused pleaded not guilty to the charge and prayed for trial. After recording the evidence and hearing the learned Advocates for the respective parties, the learned Sessions Judge has passed the aforesaid judgement and order of conviction and sentence against which the present appeal has been preferred.

3.0 Learned Advocate for the appellant submitted that the prosecution has not established the case against the appellant-accused beyond reasonable doubt and therefore the learned Judge ought not to have convicted the appellant. She submitted that there are various contradictions in the dying declaration. According to her the victim had suffered burn injuries on both the hands and she was not in a position to sign anything and in spite of the same she had signed the dying declaration, which cannot be

believed. She submitted that in view of this fact the dying declaration is not trustworthy. She further submitted that it was an accidental death and sufficient material is brought on record to establish that this is an accidental death. Learned Advocate therefore submitted that the Sessions Court has committed an error in convicting the appellant and therefore the present appeal deserves to be allowed.

4.0 Mr. H.L. Jani, learned APP, appearing for the respondent State submitted that there is ample evidence on record to establish the case of the prosecution. He submitted that the evidence of the doctor, the dying declaration and other medical evidence clearly support the case of the prosecution and therefore there are no merits in the appeal and the same deserves to be dismissed.

5.0 We have heard the learned Advocates for the respective parties and have gone through the entire evidence on record. In order to establish the case against the appellant-accused the prosecution has examined the following witnesses:

1. Mangalbhai Somabhai (Exh.9)

2. Dhulabhai Somabhai (Exh.11)
3. Nanduben Mangalbhai Somabhai (Exh.12)
4. Kamlaben Punjabhai (Exh.13)
5. Dr. Vaishali Yashvantlal Shukla (Exh.17)
6. Batukbhai Damjibhai Deora (Exh.22)
7. Kamalkant Harjivandas (Exh.24)
8. Kanaksinh Nathusinh (Exh.28)
9. Nandubhai Kalidas Patel (Exh.30)
10. Ramanbhai Nalsibhai (Exh.31)
11. Vaghjibhai Dipsingbhai Dabhi (Exh.33)
12. Vinodbhai Dhanjibhai Kharadi (Exh.34).

The prosecution had produced the following documents on record:

1. Complaint (Exh.10)
2. Panchnama of body of the accused (Exh.14)
3. Panchnama of burnt clothes of the deceased (Exh.15).
4. Inquest Panchnama (Exh.16)
5. Yad for carrying out the postmortem (Exh.18)
6. Marnotar form ((Exh.19)
7. Postmortem Report (Exh.20)
8. Medical case papes of Kailasben (Exh.23)
9. Yadi written to Executive Magistarate (Exh.25)
10. Yadi giventoMedical Officers
11. Dying declaration (Exh.27)
12. Panchnama of scene of offence (Exh.29)
13. Panchnama of custody of Muddamal ((Ex.32)
14. Yadi in respect of map of scene of offence (Exh.35)
15. Statement of Kailasben (Exh.36)
16. Yadi written by Raopura Police Station (Exh.37)
17. Yadi writtenby Dakor Police Station
18. Wireless Message (Exh.39)
19. Copy of VHF message (Exh.40)
20. Yadi for Executive Magistrate (Exh.41)
21. Yadi for Muddamal FSL (Exh.42).
22. FSL Report ((Exh.43)

6.0 The prosecution has examined Dr.Batukbhai Damjibhai Deo

(PW6-Exh.22). According to his statement, Kailashben was admitted in the hospital on 9.8.1997 at about 9.40 am. He has given treatment to Kailashben on all the dates and he has proved the treatment sheet in his evidence. He had treated her upto 17.8.1997. According to him Kailashben expired on 18.8.1997. On that day Dr. Kiritbhai Shah was on duty whose signature is also on the case papers.

8.0 Dr. Vaishali Yashvantlal Shukla (PW5) was examined at Exh.17. She has deposed that she has performed the postmortem of dead body of Kailashben. She has categorically deposed that she received burn injuries mentioned in column no.17 of the postmortem note and thy are second and third degree burns on the body as a whole. She has given details regarding the injury which she received on various parts of her body. She has also proved the injuries narrated in column no.17 of the postmortem notes and internal injuries at column no.20. She has also proved postmortem note exh.20. She deposed that all the injuries which have been received by the deceasd were antemortem and it was sufficient to cause death.

9.0 The dying declaration recorded by the Executive Magistrate is produced at Exh.27 which is in question and answer form. In the dying declaration Kailashben had specifically stated that in the morning at about 6 O' clock there was an altercation between her father in law and mother in law. Therefore the appellant accused started abusing Kailashben and told her to go away. Subsequently he had sprinkled kerosene over her and set her ablaze. She was also given threat of giving electric current. She was brought to the hospital by her uncle-in-law. She was very specific and her statement is corroborated with other evidence on record.

10.0 Shri Kamalkant Harjivandas (PW7-Exh.24) the Executive Magistrate was examined by the prosecution. He deposed that on receipt of Yadi he had gone to SSG Hospital. He inquired from the doctor whether the patient was conscious or not. Doctor opined that the patient was conscious and thereafter he had gone to the patient and has taken her statement and the patient has signed on the statement. This witness as also the doctor have signed the said statement. In his deposition he has clearly narrated the statement of the deceased and fully supported the dying declaration.

11.0 Vinodbhai Dhanjibhai Kharadi (PW12) was examined by the prosecution at Exh.34. He has stated that Mangalbhai Somabhai had lodged the complaint, he had visited the place of incident and completed necessary formalities like drawing panchnama, recording statements, etc. He has also collected earth mixed with kerosene, kerosene gallon, etc. He has arrested the appellant-accused. He has also stated that Yadi was sent to Executive Magistrate and on ascertaining from the doctor that the patient was conscious, dying declaration was recorded. He stated that in the complaint the complainant had stated that the appellant had poured kerosene over Kailashben and set her ablaze. Evidence of this witness has fully supported the case of prosecution.

12.0 We have gone through the oral as well as documentary evidence which has been shown to us by the learned Advocates for the respective parties along with recent judgement delivered by the courts below, which establish that the prosecution case is based only on dying declaration. It is required to be noted that dying declaration has been recorded by Executive Magistrate Kamalkant Harjivandas (PW7-Exh.27) and through him the prosecution is able to prove the dying declaration Exh.27.

12.1 We have also gone through the original dying declaration which bears the signature of victim along with endorsement of the doctor wherein he has categorically made endorsement “Patient is fully conscious” and upon the above endorsement he himself has signed and also put the time and date as 9.8.1997 and 2.31. Not only that the prosecution got support from the Yadi Exh.25 and Executive Magistrate categorically deposed that when he received Yadi for recording the dying declaration of the victim, the Yadi accompanied opinion of the doctor regarding physical and mental condition for recording her dying declaration.

12.2 He has also established from his oral evidence that before recording the dying declaration, apart from the two opinions as stated above, he ascertained the condition of the patient for his personal satisfaction and he himself has inquired from the victim and during the course of conversation he himself found that the physical and mental condition of the victim is good and she is in a position to give dying declaration and therefore as per his deposition he has recorded his statement in question and answer

form and after that he has obtained the signature of the victim upon the dying declaration.

12.3 As stated above, we have verified the same and we are of the opinion that the dying declaration is trustworthy. We have also gone through minutely the cross examination made by the learned counsel for the accused, but nothing contrary has come out which would shake the evidence of the Executive Magistrate.

12.4 It is also required to be noted that the incident in question has taken place in the matrimonial home and obviously witnesses may not be available to the prosecution mainly on the ground that except the victim all other family members are nearest relatives of the appellant-accused and therefore obviously they may not support the prosecution at all and in these circumstances one should not expect any cooperation from the relative of the victim and they will support the say of the accused. Here also the same thing has happened. Nobody has supported the say of the prosecution, but merely on that ground the evidence on record, which are otherwise trustworthy cannot be discharged.

12.4 It further requires to be noted that the prosecution has only relied upon the dying declaration at Exh.27. Law on this point is very settled that conviction can be based only on the basis of dying declaration provided a dying declaration is free from all doubts. It is also required to be verified that before or during the course of recording of dying declaration no opportunity would have been given to the other persons to tutor her. It is required to be recorded in a free atmosphere i.e. in absence of close relatives, etc. Here in this case, as per the evidence of the Executive Magistrate it has been established that dying declaration has been recorded after taking all due care and caution and dying declaration discloses all materials which shows clear case against the appellant and nothing contrary has come out.

12.6 In these circumstances we believe that the case of the prosecution based only on dying declaration is trustworthy and therefore person can be convicted only on the basis of said dying declaration which requires any corroboration. In view of the above we are of the opinion that dying declaration is trustworthy and free

from doubts and therefore we accept it in toto and we believe that the prosecution is able to prove the case against the accused-appellant beyond doubt. Not only that we are not discussing further regarding the homicidal death, but we have stated above regarding the injury, postmortem note and also gone through the evidence of the Dr. Vaishali Yashvantlal Shukla (PW5) and from that it has been established that the death of the deceased is a homicidal death and the other side has also not raised any contention regarding the same and therefore we are not dealing further into the matter in details.

13.0 A theory has been put forward by the appellant-accused that it was an accidental case. However, the appellant-accused has failed to prove the same. It is required to be noted that the presence of the appellant-accused in the morning at home is natural one. If it was an accidental death, naturally, he would have taken Kailashben to Hospital. However, he has not done so. His conduct at the relevant time itself shows his guilt. Further if it was an accidental fire, there was no reason for the deceased to make false allegations against her own husband. The appellant has not put forward any possible explanation for giving such dying

declaration. The evidence of the above witnesses are consistent and reliable and therefore, we do not see any merits in the matter. Though some of the witnesses have turned hostile, the above consistent evidence clearly establish the prosecution case.

14.0 The law on the subject is well settled. In a recent decision of the Hon'ble Apex Court in the case of ***Smt. Shakuntala v/s. State of Haryana*** reported in ***2007(5) Supreme Today 668***, the Apex Court has narrated the principle on which dying declaration can be admitted in evidence. It has been held therein that dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. However, it cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. In the case on hand, we find the Dying Declarations to be wholly trustworthy and free from all doubts and are of the opinion that conviction can be based on it, without any corroboration.

15.0 On an evaluation of the entire evidence appearing on record, we are of the opinion that prosecution is able to prove the case against the appellant-accused and therefore the impugned

judgement and order of conviction and sentence delivered by the Sessions Court below being just and proper do not call for any interference. Under the circumstances the appeal is required to be dismissed. Accordingly appeal is dismissed.

[R.P. DHOLAKIA, J.]

[K.S. JHAVERI, J.]

ar